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Introduction: *Gilmer v. Interstate/Johnson Lane Corporation*: Ten Years After

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On March 21, 2001, the United States Supreme Court, by a five to four majority, resolved a conflict among the Circuit Courts of Appeals by concluding that section 1 of the Federal Arbitration Act¹ exempted only those contracts of employment involving transportation workers, but not other employment contracts.² With that decision, the Court rendered the articles of this symposium urgent, not just interesting, reading.

Arbitration is a private dispute resolution process. There is much to recommend its use: low cost, reasonable access, prompt hearings, decision-makers with subject-matter expertise, and participation in the process by all those affected by the outcome. Parties can agree to use arbitration as a particular controversy arises ("voluntary arbitration") or can contract to resolve all "future disputes" via the arbitral process. The controversy that *Gilmer*³ addressed is set in the context in which one party, the employer, insists that the non-union employee agree, as a condition of employment, to resolve all future disputes in arbitration ("mandatory arbitration of future disputes"). The fierce concern about using arbitration in this way is fueled by the belief that permitting an employer to mandate arbitration as the exclusive forum to resolve all employment controversies, including, and most especially, those allegations of employment discrimination based on race, sex, religion, age, or disabilities in violation of federal or state laws, enables the employer to systematically escape full-faith compliance with the very employee rights and protections those statutes are designed to secure. The contributors to this symposium carefully and creatively assess whether *Gilmer*'s legacy warrants such concern by addressing three central themes: the nature of the twenty-first century workplace; the actual impact of *Gilmer*

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¹ 9 U.S.C. § 1 (1994 & Supp. 2000).

² *Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302 (2001).

³ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

on arbitral practices within both the union and non-union setting; and the relationship of courts and administrative agencies to the arbitral process.

Professor Stone engagingly invites us to consider the nature of the "boundaryless" workplace of the twenty-first century and examines its implications for the arbitral process. She notes, for instance, that in a conventional workplace setting, an employee enjoyed reasonable employment security while simultaneously developing his or her vocational skills through sustained promotional opportunities; the use of arbitration to resolve conflicts regarding promotions or discharge is carefully crafted to secure legitimate expectations within such an environment. But the new employment relationship is "boundaryless," as many employees expect that their career will involve multiple shifts within and across firms. With an employee's interest focused on gaining transferable employment skills, developing employment networks, pegging compensation to market-performance, and operating in an environment of peer-based decision-making, the question arises whether arbitration is better or less able to address controversies arising over these matters than is the traditional adjudicatory forum, and, more challenging, whether discriminatory practices will surface in ways that the arbitral process can identify and address.

Most contributors thoughtfully analyze whether arbitration's use should be altered, reshaped, or modified in an attempt to meet the twin goals of using arbitration in a way that is consistent with affording basic statutory protections that employees arguably might secure in the judicial forum. Important topics regarding process design and practice receive careful, provocative treatment: How should one structure the arbitration process if it is only one option among several dispute resolution mechanisms within the organizational structure? How does one ensure access to arbitration? What training and qualifications should arbitrators possess to handle these types of disputes? What "due process" features should be mandated when arbitrating a statutory claim, and can they be incorporated in a way that does not simply reproduce the judicial process? Should the Union's role alter if *Gilmer* is ultimately interpreted to overrule *Alexander v. Gardner-Denver Co.*?⁴ What tactical and practical advantages do the employer and employee have in the arbitral process? And, perhaps most provocatively, what type of empirical data is relevant to, and available (even in principle) for, making the comparative assessment that one dispute resolution forum (arbitration) is "better or worse" than another (court) for resolving such controversies?

Those contributors who offer a third perspective to the dialogue step

⁴ *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

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back from examining the design and practice features of arbitration to assess the jurisprudential treatment of arbitrating these *Gilmer*-type cases by courts and administrative agencies. Engagingly, for instance, Professor Sternlight queries: why does the Court not examine mandated arbitration of employment cases within the conceptual framework of the Court's jurisprudence dealing with whether one party can compel another to "waive" his or her right to a jury trial as one element in a business contractual relationship? Were the courts to do so, she suggests, they would be notably more reticent about routinely enforcing mandatory arbitration clauses. Similarly, Judith Sadler examines whether the National Labor Relation Board's gracious attitude in deferring to arbitral awards involving statutory issues under the National Labor Relations Act is consistent with its opposition to the use of mandatory arbitration agreements between private sector non-union employees and employers.

A primary goal of this symposium was to have leading academics and practitioners sharply, responsibly, and provocatively examine, a decade after *Gilmer*, the opportunities and dangers that permeate arbitration's use in the world of work. As readers will discover in the following pages, that goal was met admirably.

